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OFFICE OF
WATER QUALITY

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OFFICIAL COMMENT

November 14, 2008

#08-764 (Antidegradation)
MaryAnn Stevens
Mail Code 65-40
Rules Section
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46204-2251

Dear Ms. Stevens,

The Indiana Water Quality Coalition and the Indiana Manufacturers Association appreciate the opportunity to provide the following comments on the Indiana Department of Environmental Management's first notice of rulemaking concerning antidegradation standards and implementation procedures. The Indiana Water Quality Coalition (the Coalition) is a group of businesses with shared interests in Indiana regulations, policies and operating procedures concerning water quality. The Indiana Manufacturers Association (IMA) is a voluntary, non-profit trade association representing nearly 2,000 companies and 600,000 manufacturing jobs. Each of these entities has members or facilities in Indiana that may be affected by adoption of rules concerning antidegradation standards and implementation procedures.

Although IDEM has decided to begin the rulemaking process anew by publishing a first notice, there is a long history associated with antidegradation rulemaking in Indiana. These rulemaking activities date back to the late 1990s, following adoption of the Great Lakes rules, when IDEM undertook certain triennial review activities and convened a Water Quality Advisory Group to address various water quality issues. The Coalition actively participated in that effort, including development and submission of position papers on all aspects of the antidegradation review process in February 2002. We also submitted detailed comments on IDEM's March 2003 first notice of rulemaking and March 2005 second notice of rulemaking. All of these submissions were made following enactment of SEA 431 (Public Law 140-2000), and reflect the mandates of that law. These past submissions provide a complete description of our positions on each aspect of antidegradation review. However, for purposes of this new first notice, we believe the antidegradation rulemaking should be guided by the following three key principles:

REASONABLE TRIGGERS FOR REVIEW

Antidegradation review can be time-consuming and expensive. Also, it can introduce a substantial element of uncertainty into business planning, concerning both how long the process will take and what the outcome will be. For these reasons, the rule should contain an applicability provision that uses a brightline trigger of only conducting antidegradation review when a discharger is requesting a new or increased discharge that requires a new or modified NPDES permit. Furthermore, it is important to ensure that the review process focuses on more significant projects, rather than small projects that have little or no impact on pollutant loadings in waters. This focus makes sense for the simple reason that antidegradation addresses streams and lakes that possess water quality better than standards. The antidegradation program never allows any increases that would violate those standards, so there is no risk that increases will cause unsafe water quality. The General Assembly recognized this when it enacted SEA 431, which specifically obligates IDEM to define levels below which antidegradation review would not be required. IDEM included a de minimis level in its Great Lakes antidegradation rules, and other states across the country also have incorporated de minimis levels in their antidegradation rules. The new rulemaking effort should do the same.

APPROPRIATE EXCLUSIONS FROM FULL REVIEW

The main purpose of antidegradation review, for a new or increased discharge, is to ensure that the increase is necessary and will bring social or economic benefits. In some cases, it is clear, without doing such a review, that the increase meets these tests. For example, some facilities have been required, under the Clean Air Act, to install equipment to reduce their air emissions, which end up generating additional wastewater loadings. Or, a company may pursue cleanup of soil or groundwater contamination at a site, and part of the remedy is to discharge treated water to a nearby waterbody. Activities of this sort should not be required to undergo a full antidegradation review, with a detailed demonstration of necessity and socio-economic benefit. In this type of situation, requiring a full antidegradation review would be unnecessary, and could actually be counterproductive, by slowing down or even preventing actions that are environmentally productive.

REASONABLE PROCESS FOR OBTAINING APPROVALS

There are some projects, with significant new or increased discharges, for which a full antidegradation review will be necessary. However, it is important that this process be designed to ensure that worthwhile projects are not unnecessarily discouraged, impeded or even halted. That would have profound effects on business and municipal planning, with adverse impacts on economic growth and on society generally, with little or no benefit to water quality. To avoid that result, the rules need to establish a clear, step-wise process for antidegradation review that all stakeholders can understand and participate in at appropriate times. The criteria that the agency will use to decide if a project passes review need to be clearly spelled out, but should not be so rigid as to preclude consideration of case-specific factors. In the review process, due deference needs to be given to determinations made by local authorities concerning the social and economic benefits that would result from the proposed projects. Perhaps most importantly,

the process needs to have timelines built in, so the review takes place within a reasonable timeframe that will allow proposing entities to make plans without enduring enormous uncertainty.

In addition to these key guiding principles, we have several specific comments on the antidegradation rulemaking:

- General permits: The rulemaking must clearly address antidegradation review of each general permit rule, so it is clear that specific activities qualifying for a general permit rule do not need to go through individual antidegradation review. It is essential that IDEM address this issue so that Indiana may retain the integrity of the general permitting process. IDEM could address this issue through a number of methods, including opening up each general permit rule to make a finding that compliance with the rule meets the antidegradation standard; providing a detailed analysis of each general permit rule to be submitted as supporting justification when submitting the antidegradation rule to U.S. EPA for review and approval; and/or placing language in the applicability section of the antidegradation rule.
- Water quality certifications: The implementation procedures in this rulemaking are designed for and should only apply to activities subject to the NPDES permitting program. The rulemaking should specify that the implementation procedures do not apply to Clean Water Act Section 401 water quality certifications.
- De minimis technology-based effluent limitations (DTBELs): We urge IDEM to not pursue use of DTBELs in the antidegradation rulemaking. Development of DTBELs would be extremely time-consuming and of limited value in the application of antidegradation.
- Potential fiscal impact: The first notice contains a cursory description of the potential fiscal impact to comply with an antidegradation rulemaking. As this rulemaking progresses, IDEM must conduct a more thorough analysis to comply with the statutory requirements in IC 4-22-2-28 and IC 13-14-9-4.2. Although the total estimated economic impact is not yet known, it is clear that the draft rule has the potential to cost regulated entities in excess of \$500,000. The cap on a single water quality improvement project is \$500,000, and that does not take into consideration the costs associated with preparation of antidegradation demonstrations. The technical and socio-economic requirements for the antidegradation review could require significant resources. Furthermore, there will be costs associated with demonstrating that a discharger will not cause a significant lowering of water quality, because it falls under the de minimis threshold or one of the activities that do not need to undergo full review. For example, one discharger in the state had to spend in excess of \$25,000 just to justify to IDEM that it would not cause a significant lowering of water quality.
- Treatment of exceptional use waters (EUWs): SEA 431 calls for IDEM to re-evaluate all EUWs to determine whether they qualify as outstanding state resource waters (OSRWs) or should be treated as high quality waters. Despite the clear intention of SEA 431 concerning phase out of the EUW category, the first notice appears to contemplate that EUWs will be subject to the same antidegradation standards and implementation procedures for OSRWs. We request that IDEM establish a plan and process for fulfilling the requirement to re-evaluate and re-designate EUWs.

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We appreciate IDEM's consideration of these comments, and we look forward to working with the agency, other stakeholders, and the Water Pollution Control Board on development of appropriate draft rule language concerning Indiana's antidegradation standards and implementation procedures.

Sincerely,

A handwritten signature in black ink, appearing to read "Kari A. Evans". The signature is fluid and cursive, with the first name "Kari" being more prominent than the last name "Evans".

Kari A. Evans

cc: Indiana Water Quality Coalition
Patrick Bennett, Indiana Manufacturers Association